

Steven's Choice

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This hypothetical poses a gut-wrenching scenario.¹ The prospect of someone convicted and sentenced to prison for a crime he did not commit is one of my worst nightmares.² There aren't many issues about which I have deeper feelings or more strongly held convictions. My reaction to wrongful convictions is not just intellectual; if I am really honest, it is often visceral. Indeed, those close to me know that few things move me to anger, but injustice and unfairness in our criminal justice system generate righteous indignation on my part. To be candid, I hate prisons. I've visited prisons and jails hundreds of times in my over thirty years as a lawyer, but the feelings of dread and foreboding as I go in, and the feelings of relief, of lightness in my step as I leave, have never diminished.

Although prisons are a necessary evil, we imprison far too many people in our society, and for far too long.³ Too many nonviolent offenders are serving long sentences, and many young persons are sentenced to life in prison. Perhaps the most frustrating issue in the criminal justice system is the scandal of innocent persons convicted and sentenced to prison or even to death.⁴ No system can be perfect, but there are far too many people in American prisons serving sentences for crimes that they did not commit.

David in our hypothetical is one of those people.

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¹ Many thanks to Kevin McMunigal for crafting such an important and thought provoking scenario.

² I mean that literally. I have an occasional nightmare in which I have been sent to prison for a crime I did not commit. Fortunately, I don't have that dream often, but it is always deeply disturbing when it happens.

³ See Adam Gopnik, *The Caging of America*, THE NEW YORKER (Jan. 30, 2012), http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik.

⁴ To take only two examples: Georgia recently executed Troy Davis in the face of compelling evidence of his actual innocence. After he had been sentenced to death, seven of the nine eyewitnesses against him recanted their testimony. Notwithstanding the substantial doubts about his guilt, the state of Georgia and federal courts allowed the execution to go forward. *Troy Davis*, NYTIMES.COM, http://topics.nytimes.com/top/reference/timestopics/people/d/troy_davis/index.html (last updated Sept. 22, 2011). Texas executed Cameron Todd Willingham for the arson/murder of his children in 2004. It has now been established that the expert testimony offered against him at trial was seriously flawed; in fact, arson experts now agree that the fire was accidental and that there was no murder at all. David Grann, *Trial by Fire: Did Texas execute an innocent man?*, THE NEW YORKER (Sept. 7, 2009), http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann. For a comprehensive list of resources on innocence and the death penalty, see DEATH PENALTY INFO, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (last visited Oct. 20, 2009). See also HELEN PREJEAN, *THE DEATH OF INNOCENTS* (2005).

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But, I've taken us down the wrong path at the outset. My moral views and emotional reactions to wrongful convictions is the wrong starting point. And to jump quickly to the societal issue of wrongful convictions or to my concerns with David's plight likewise heads in the wrong direction.

My counseling session with Steven is *not primarily about me and my views and feelings*. (I'm *not* saying my convictions and feelings are irrelevant. To the contrary, recognizing my feelings and deeply held beliefs is crucial to effective counseling of Steven, and I'll return to that below. But that is not where I should begin.)

The starting point must be Steven and what he needs and has a right to expect from me as his lawyer. Steven is in a desperate situation, and he has turned to me for help. According to our hypothetical, I am already his lawyer, and he is my client. Indeed, I think it is significant that he came to his *lawyer*.

What does he deserve and what can he reasonably expect from a lawyer? Three aspects are critical. Steven is entitled to loyalty from me; he needs my professional expertise and judgment; and he should expect wise counsel in making this difficult decision.

I. STEVEN IS ENTITLED TO MY LOYALTY

Steven is vulnerable, scared, and needs someone he can trust to help him. Steven has a right to expect me to put his interests first, to do what is best for Steven—and not what is best for me or for anyone else. My primary duty as a lawyer is to act in Steven's interests. I have a fiduciary duty to act in his best interests and on his behalf within the bounds of the law. Although as a lawyer I am an "officer of the court," my primary duty is not to the court or to justice abstractly defined.

Although other professionals and other persons in other roles in our society have fiduciary obligations, I think the centrality of fiduciary obligation for lawyers is distinctive. I have personal experience that supports this claim. Over the past decade, I have had the opportunity to teach two different cross-professional interdisciplinary courses: one was a joint course between law and marriage and family therapy graduate students, and the other combined law students and students preparing to be Protestant clergy.⁵ The courses explored the differing vocational and professional responsibilities of lawyers on the one hand and ministers and therapists on the other. These professions have many obligations in common to those they serve, including obligations of confidentiality and of loyalty. The lawyer's adversary ethic, the pastoral role, and the therapist's roles,

⁵ I discuss these courses in *The Lawyer Meets the Therapist, the Minister, and the Psychiatrist: Law School Cross-Professional Collaboration*, 63 MERCER L. REV. 959, 961 (2012).

however, are clearly distinct and sometimes entail widely differing responsibilities. For example, in our discussions of marriage and divorce in both courses, the law students tended to limit their focus to their client and the professional responsibilities that they owed to the client. The ministry and therapy students tended to have a broader focus: therapists focus primarily on the family systems and ministers on their congregation as a whole, and both therapists and ministers focused more on the well-being of the couples and families involved than on the individual. It's not that lawyers are unconcerned with consequences to persons other than their client, but lawyers approach problems from the starting point of duty to their client.

II. STEVEN NEEDS MY PROFESSIONAL EXPERTISE AND JUDGMENT

Steven is in a very difficult legal predicament. These are stormy waters, and he needs someone who can help navigate his way through. He has come to me as a lawyer, and he needs my legal expertise. Steven needs to know what is likely to happen if he comes forward, and what is likely if he doesn't, and it takes an experienced lawyer to provide what he needs in this regard. I owe him my best judgment, based on my knowledge and experience, as to what the legal consequences would be of various courses of action. The expertise needed here is not primarily knowledge of the law; it's not something one can research in the library. The expertise required is judgment based on experience. That professional judgment depends in part upon knowledge of the prosecutor in this case, including my assessment about his or her motives, and it requires knowledge of the presiding judge.

Of course we cannot know with certainty what will happen; as is characteristic of professional decision-making, I must exercise judgment in the midst of uncertainty. I need to recognize, and to convey to Steven, that the consequences of Steven coming forward are not obvious or simple. We don't know what will happen if Steven comes forward and tells his story to the authorities. At a minimum, this is not simply a matter of Steven coming forward, freeing David, and accepting the sentence himself.

Although I cannot predict with certainty what is likely to happen, I owe him more than a vague statement that "there is no way to know what will happen." Steven needs my honesty here. He needs to hear what I think is likely to happen, even if it's not what he wants to hear. My experience tells me that the prosecutor is unlikely to believe Steven. The prosecutor has just convinced a jury beyond a reasonable doubt that David committed this murder. I'm pretty confident that the prosecutor will fight hard to keep David's conviction from being reversed. Even worse for Steven, the prosecutor may charge Steven with this murder without exonerating David, on a theory that they are both responsible for the killing. One thing we have learned from erroneous convictions is that prosecutors are very

reluctant to give them up, and they rarely admit that they have charged and convicted the wrong person.⁶

So David may not be helped by Steven's coming forward. The other side of that coin is that it is likewise not clear what will happen to Steven himself if he comes forward. By admitting to his part in the killing, Steven of course places himself in serious legal jeopardy—but the extent of that jeopardy is far from clear. Even if what Steven has told me about the killing is true, he may not be guilty of this murder. I would need to know more about what happened leading up to the killing of the victim. All I know so far is that an argument ensued during which Steven shot and killed the victim. Although not likely, Steven may have a valid defense of accident or self-defense, or this may be a lesser form of homicide than first degree murder. It is certainly not clear that he should plead guilty to first degree murder.

Steven may very well be facing a trial himself. I've been around enough to know that the truth does not inevitably come out at a trial and that justice doesn't always result. (You don't have to take my word for that; ask David!) I cannot ignore the possibility that by coming forward to the authorities he may subject himself to a greater punishment than he really deserves.

III. STEVEN NEEDS A COUNSELOR

Steven needs someone who can help him decide what to do. He needs someone who is skilled at the art of counseling, someone who can help him make the best decision for him in these very difficult circumstances. Counseling is a complex relationship and process in which the counselor helps the client make the best decision he can for himself, under all the circumstances and considering all the likely consequences.⁷

Let me be clear about terminology: Steven does not need *advice*. He most emphatically does not need for someone like me to tell him what to do. In many ways, advice-giving is the opposite of counseling, if "advice" is the process of telling someone what the advice-giver thinks he ought to do. For a decision as momentous as the one facing Steven, it is crucial that Steven make the decision for himself. He is the one who knows himself the best, and he is the one who must

⁶ See *supra* note 4.

⁷ Over the past generation, a wealth of scholarship and pedagogical materials, drawn from clinical legal education, has shaped our understanding of the nature and importance of client counseling. Much of this work goes under the banner of the "client-centered approach." See DAVID A. BINDER ET AL., *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 2-15 (1991). For a comprehensive examination of the history and theoretical basis for this approach, see Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990). For a survey of the growth and development of the client-centered approach into a multiplicity of closely-related lawyering theories, see Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006).

live with the consequences of the decision. Counseling ought to help him do that, whereas advice likely will not.

Counseling is a complex process that necessarily contains several distinct parts. Although analyzing the different parts of counseling does not provide a blueprint and should not be a straightjacket for the conversation, it is important to think about the different things that ought to happen in counseling.

Counseling will help Steven identify his own interests, values, wants, and needs, and to the extent we can, to prioritize those interests. The main objective here is to help him gain self-awareness, so that he can make the best decision for him. The goal is to work in partnership with Steven so that he can live his life with integrity. I use integrity to mean both honesty and wholeness. I mean integrity in a sense of living an authentic life, a life that allows one to handle difficulties consistently with who he is and who he is striving to be.⁸ There is no substitute for spending a good deal of time with Steven: having him discuss what is most important to him, what his motivations are, what his fears and concerns are, what he hopes to accomplish. Understanding his motivations is especially important: What brought him forward to me at this time? Is he concerned primarily about what happens to David? Is he more concerned about accepting responsibility for his own actions, regardless of what happens to David?

Counseling will also help Steven evaluate possible courses of action in light of those interests. The lawyer should explain the likely consequences of the various courses of action. This includes the evaluation described above of what is likely to happen legally if he comes forward, but it includes much more than those "legal" consequences. Steven needs to think about what his life will be like in either event: if he does not come forward and therefore lives with the knowledge that David is serving time for a crime he did not commit, but also the very real likelihood that he will go to prison himself if he does come forward.

Finally, counseling needs to help Steven actually make a decision. In helping him come to a decision, I would ask him to envision how he would feel about himself if he takes various courses of action. Ultimately, I want him to make the decision that is most true to his own best self. He needs to be true not just to the person he has been up to this point in his life, but to the person he hopes to become. That kind of decision by Steven will require that he understand himself pretty well. Helping Steven understand himself, however, is very difficult for a lawyer who is not self-aware.

IV. SELF-AWARENESS BY THE LAWYER

As I stated at the outset of this essay, I am very concerned about David and his unjust and erroneous conviction, and my feelings on this are quite strong.

⁸ Daisy Hurst Floyd, *The Opportunity for Legal Education: A Symposium for the Mercer Law Review*, 59 MERCER L. REV. 859, 882 (2008) (Floyd's segment of the symposium was entitled "Forming Professionals: A Journey of Identity and Purpose.").

Those personal feelings make counseling Steven even more complicated for me. If I'm truly honest with myself, I really want Steven to come forward. Although my primary professional duty is to Steven, on a personal level I have a deep concern about David, who is facing a lengthy prison sentence for a crime he did not commit. I must admit (to myself) that an injustice such as this outrages me, and I would want to see it corrected. I would want Steven to come forward in an attempt to free David.

That means that I must be very careful in counseling Steven. My task is to help *him* decide what is best for him, and not what *I* think is best for him to do. He has directly asked me "what should I do?" In light of my own views about the injustice to David, I must be especially careful not to manipulate Steven into doing what I think is best.

This is where understanding my own motivations, feelings, and deep convictions is essential. In discussing counseling, I have been adamant that the lawyer must be client-centered. The irony is that in order to serve Steven's interests—to put Steven first—the lawyer must look within. Deep self-awareness and self-understanding are necessary to effective counseling. I know lawyers who think self-awareness, reflection, and focus on our own inner lives is self-indulgent or "touchy-feely." In fact, though, a lawyer cannot be an effective counselor without self-awareness and reflection. In particular, a lawyer cannot avoid the dangers of paternalism and manipulation unless the lawyer is well aware of those dangers and works to minimize them. Moreover, if the lawyer is to discuss something as difficult as the morality of Steven's choice with him, the lawyer must have a good deal of self-awareness.

V. MORAL CONSIDERATIONS IN COUNSELING

The call for this symposium asks us to discuss whether we should refer to moral considerations in our counseling of Steven. The lawyer's rules of professional conduct do not provide much help. Model Rule 2.1 says that a lawyer "may" refer to moral considerations in counseling a client.⁹ In Model Rules-speak, "may" means a lawyer has discretion to refer to moral considerations. Under Rule 2.1, the lawyer is neither required to nor prohibited from referring to moral considerations when counseling a client, and would not be subject to professional discipline if she chose either course of action.

Rule 2.1 does provide help for those lawyers who assume that moral considerations are somehow off limits for lawyer-client dialogue. It is a useful guidepost to counter those who insist that it is somehow inappropriate to inject morality into the lawyer-client conversation. On the other hand, it is not helpful on whether and under what circumstances a lawyer should refer to moral considerations. And obviously it provides no guidance whatsoever on *how* to discuss moral concerns in counseling a client.

⁹ MODEL RULES OF PROF'L CONDUCT R. 2.1 (2011).

In some ways, whether to discuss moral considerations is the easiest aspect of this hypothetical. *Of course* I should refer to moral considerations; I cannot imagine how I could counsel Steven without reference to moral considerations. Steven is obviously upset, and has sought me out for help. Steven is not a typical client in a criminal case. In fact, at this point he is not a criminal defendant. For those accused of crime, the law has come after them, and they need a lawyer to react, to “defend” them against the power of the state. Steven, on the other hand, has been proactive—he has come to a lawyer when he didn’t need to, and he has come seeking help with this decision whether to come forward. He has directly asked me what he should do.

Although the moral issues in Steven’s case are obvious, I would go further. The process of counseling I describe above means that moral considerations will be discussed in virtually all legal counseling. The decisions clients must make in legal matters almost always have a moral component. In fact, it is difficult to imagine a problem that a client presents to a lawyer that does not raise questions such as: how to get along with others, what is fair under the circumstances, choosing the lesser of two evils, how truthful to be, etc. Those are moral issues, and clients experience them as such. Lawyers cannot help clients make decisions without acknowledging that reality. It is certainly a mistake for lawyers to assume that clients don’t care about morality, that they only want to maximize self-interest narrowly defined.¹⁰

Moreover, not discussing the moral aspects of these issues *is* a form of dealing with moral considerations. Moral concerns will inevitably arise in most lawyer-client conversations, and one must work pretty hard to keep moral talk out of the conversation. To the extent the lawyer does that explicitly or implicitly, it is a clear signal to the client that the moral dimension of the problem is not important.

So discussing moral considerations with clients is necessary for the lawyer to be the counselor the client needs. But the fact that it is necessary doesn’t make it easy! Discussing moral considerations with clients is difficult and fraught with danger. It must be done with acknowledgement of the complexities, self-awareness, and a rigorous honesty with ourselves about our own motivations and feelings.

The dangers are many. Out of awareness of those dangers, many lawyers are hesitant to embrace moral counseling by lawyers. Those objections include:

- Some assert that moral counseling is not appropriate because the lawyer has no special expertise in morality.
- Some object that moral counseling leads to attorney dominance in client relationships—usually referred to in legal ethics literature as

¹⁰ For an excellent discussion of the need to see clients in all their wholeness, see Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010).

paternalism. Put differently, the concern is that the lawyer may “impose” her morality on her client.

- Others are concerned that when a lawyer injects “morals” talk in attorney-client conversation, it is off putting and therefore ineffective and counterproductive.¹¹

Each of these concerns is legitimate; these are real dangers. The answer to these concerns, however, is not to forswear any discussion of morality with clients. No, the key is to be constantly on guard against these dangers. As to the “lack of expertise” concern, it is crucial to remember that the lawyer is not called upon to dispense expert moral guidance; the lawyer’s task is to help the client identify his or her own moral concerns and to help the client situate those concerns within the client’s own moral life.

As to paternalism, the lawyer must remember that this is the client’s life and the client must make the decision. Paternalism is the polar opposite of the client-centered approach we need. But what if a client, like Steven, directly asks us what he should do? I should not answer that question directly because of a real concern that my answer will short circuit the work that Steven and I both must do to help him make his own decision. In addition, I cannot answer that question because I honestly don’t know what Steven should do. I can’t possibly put myself in Steven’s position—he and I have such different life experiences that it’s difficult for me even to imagine what it must be like to be Steven.

Finally, as to the alleged ineffectiveness of moral discussions, morals talk certainly can be off-putting; most of us don’t appreciate self-righteousness or preachiness. The key is to listen to the client more than to offer the lawyer’s opinions, and through listening to respond to the client’s concerns rather than have the lawyer set the agenda based upon the lawyer’s concerns.

VI. CONCLUSION

I don’t know how the counseling session with Steven will go. As I said, this situation is gut-wrenching for all concerned. As to Steven, this is likely the most momentous decision he will ever make; whatever he decides will have a profound impact upon the rest of his life. Of course there are also enormous consequences for David. To provide what Steven needs, the lawyer must be a person of a certain character; she must possess a range of virtues, including courage, compassion, honesty, and especially wisdom and integrity. “[M]ost of the time, clients come to lawyers at a point of crisis, at a point when they are not at their best. The challenge for the lawyer is to help clients strive for their best under circumstances

¹¹ Note that to some extent these last two are mirror images of each other. The concern with paternalism is that the client will do what the lawyer wants regardless of the client’s wishes; the concern with “off-putting” is that the lawyer will not be able to persuade the client to do what the lawyer wants.

that make that difficult. For lawyers to do that, lawyers must know how to live their own lives with integrity, with awareness, and with purpose.”¹²

¹² Floyd, *supra* note 8, at 889.

